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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 527

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE FRANCIS J. CAFFEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND ALUMINUM COMPANY OF AMERICA, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 322-330) is reported in 164 F. (2d) 159. The opinion of that Court on the main issues in *United States* v. *Aluminum Company of America* is reported in 148 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 28, 1947. The jurisdiction of this Court is conferred by Section 29 of 15 U. S. C. as amended by

the Act of June 9, 1944, Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 262 of the Judicial Code. Certiorari was granted on March 8, 1948.

QUESTION PRESENTED

After a Circuit Court of Appeals has heard and determined an appeal pursuant to a certificate from this Court under the Act of June 9, 1944, is jurisdiction to issue the writ of mandamus herein sought to compel execution of the mandate of the Circuit Court of Appeals, in this Court or in the Circuit Court of Appeals?

STATUTES INVOLVED

The Act of June 9, 1944, c. 239, 58 Stat. 272 (15 U. S. C., Supp. V, 29) provides as follows:

> In every suit in equity brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided, however,* That if, upon any such appeal, it shall be found that, by reason of disqualification, there shall not be a quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on the merits, then, in lieu of a decision by the Supreme Court, the case shall be immediately certified by the Supreme Court to the circuit court of appeals of the circuit in which is located the district in which the suit was brought which court shall thereupon have jurisdiction to hear and determine the appeal in such case, and it shall be the duty of the senior circuit judge of said circuit court of appeals, qualified to participate in the consideration of the case on the merits, to designate immediately three circuit judges of said court, one of whom shall be himself and the other two of whom shall be the two circuit judges next in order of seniority to himself, to hear and determine the appeal in such case and it shall be the duty of

the court, so comprised, to assign the case for argument at the earliest practicable date and to hear and determine the same, and the decision of the three circuit judges so designated, or of a majority in number thereof, shall be final and there shall be no review of such decision by appeal or certiorari or otherwise.

If, by reason of disqualification, death or otherwise, any of said three circuit judges shall be unable to participate in the decision of said case, any such vacancy of vacancies shall be filled by the senior circuit judge by designating one or more other circuit judges of the said circuit next in order of seniority and, if there be none such available, he shall fill any such vacancy or vacancies by designating one or more circuit judges from another circuit or circuits, designating, in each case, the oldest available circuit judge, in order of seniority, in the circuit from which he is selected, such designation to be only with the consent of the senior circuit judge of any such other circuit.

This Act shall apply to every case pending before the Supreme Court of the United States on the date of its enactment.

Section 2 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209 (15 U. S. C. 2) provides as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 of the Sherman Act, 26 Stat. 209, as amended by the Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167 (15 U. S. C. 4) provides in part as follows:

The several district courts of the United States are hereby invested with jurisdiction to prevent and re-

strain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

STATEMENT

This proceeding grows out of a case brought by the United States against Aluminum Company of America (sometimes hereafter referred to as Alcoa) and other defendants to prevent and restrain violations of the Sherman Act. After a trial of more than two years' duration the District Court dismissed the complaint. An appeal was allowed by this Court, but a quorum of Justices of this Court to hear the case was wanting, four Justices having disqualified themselves. Congress thereupon amended the statute which provided for direct appeal to this Court from the District Courts in anti-trust cases. The amendment became law on June 9, 1944, and pursuant to it this Court certified the case to the Circuit Court of Appeals on June 12, 1944.

The Circuit Court of Appeals in an opinion filed on March 12, 1945, reversed the judgment of the District Court and held that Aluminum Company of America had monopolized and was monopolizing the aluminum ingot market of the United States (at the close of the trial in 1940) in violation of Section 2 of the Sherman Act, 148 F. 2d 416. The Circuit Court of Appeals ordered judgment of monopolization and injunctions; as to the Government's prayer for dissolution the Circuit Court of Appeals committed to the District Court determination of whether Aluminum Company of America should be dissolved and the form of any dissolution, after the agency charged with disposal of the Government's wartime aluminum plants and facilities should have performed its functions. The mandate of the Circuit Court of Appeals remanded the case

to the District Court for proceedings not inconsistent with the opinion. (R. 11.)

On April 23, 1946, the District Court entered its judgment on the mandate. (R. 12-26.) The court retained jurisdiction of the cause until after the Surplus Property Administrator shall have proposed a plan for disposition of the Government owned aluminum facilities, in order that the Attorney General might institute proceedings for the dissolution or partial dissolution of Alcoa or for the enforcement of such plan; "and for the purpose of enabling Aluminum Company to apply to this court for a determination of the question whether it still has a monopoly of the aluminum ingot market in the United States" (R. 26).

On March 31, 1947, pursuant to the quoted provision, Alcoa filed a petition in the District Court praying that a "final judgment" be entered adjudicating that Aluminum Company of America no longer has a monopoly of the aluminum ingot market of the United States and that, in consequence of the termination of such monopoly, competitive conditions have been restored in the aluminum industry (R. 27-74). The United States first moved unsuccessfully before Judge Caffey to dismiss this petition (R. 75-77). After overruling the motion, Judge Caffey set the question of Alcoa's present status as a monopoly for trial on October 15, 1947 (R. 78-79). The United States on September 11, 1947, filed a petition for a writ of mandamus in the Circuit Court of Appeals for the Second Circuit to require Judge Caffey to execute the mandate of that court by vacating so much of paragraph 12 of the judgment of the District Court "as reserves jurisdiction to enable Alcoa to apply for a determination whether it still has a monopoly, and to dismiss the petition of Alcoa," and prayed further for dismissal of Alcoa's petition and a stay of the trial proceeding scheduled to commence on October 15, 1947 (R. 1-5).

While any argument of the merits of that application is of course to be avoided in the present proceeding, a description of the writ of mandamus sought is essential for decision of the jurisdictional question raised here.

The basis of the application was that the petition of Alcoa, and the action of the District Court in sustaining it against the Government's objection and setting it for trial, were in conflict with the mandate of the Circuit Court of Appeals in that this would make the right to dissolution depend upon whether Aluminum Company of America presently has a monopoly, instead of depending upon a consideration of the remaining effects of adjudicated monopoly and the need to dissipate them and disable a monopolist, with a history of 28 years of active monopolization, from future monopolization. Additional grounds for granting mandamus were asserted to be that only the United States has standing to bring on proceedings for determination of the need for dissolution, and that the condition precedent fixed by the Circuit Court of Appeals for the District Court's inquiry into the need for dissolution—disposal of the Government's aluminum plants and facilities—has not occurred, inasmuch as the Congressionally approved disposal program is in its incipiency and has not been substantially executed (R. 2-5).

The Circuit Court of Appeals dismissed the petition for mandamus upon the ground that it was without further jurisdiction in the cause and that any jurisdiction to enforce its mandate by mandamus was in this Court (R. 322-330).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

In holding that its jurisdiction acquired by certificate of this Court pursuant to Section 29 of Title 15 U. S. C. did not include jurisdiction to issue the writ of mandamus to

require execution of the mandate of the Circuit Court of Appeals in aid of and to support the jurisdiction which that Court has exercised.

ARGUMENT

The Government's primary concern in this case is that there shall be a final determination as to whether this Court or the Circuit Court of Appeals has jurisdiction to pass upon the Government's application for mandamus. Since the Government has no reason to prefer one court as against the other, and since no party is appearing in support of the decision below, we shall endeavor to present the considerations on both sides of the question.

The Circuit Court of Appeals raised the question of its jurisdiction *sua sponte*. It held that both the text and purpose of the 1944 amendment deprived it of jurisdiction of the cause after the expiration of the term at which the original judgment was entered, that a court's power to issue mandamus "exist only as an incident to our jurisdiction to entertain an appeal," and that since future appeals would lie to the Supreme Court jurisdiction to issue the writ incidental to an appeal was lacking.

The 1944 Act provides that if a quorum of this Court is not qualified to hear the case, "the case" shall be certified to the Circuit Court of Appeals, "which court shall thereupon have jurisdiction to hear and determine *the appeal* in such case."

We agree with the court below that this language tranfers to that court only jurisdiction to hear the particular appeal, not jurisdiction over subsequent appeals in the case. It is also clear that Congress intended to confine the statute narrowly, inasmuch as the last sentence of the Act provides that "this Act shall apply to every case pending before the Supreme Court of the United States on the date of its

enactment," thus manifesting an intention that the Act not apply beyond the immediate necessities of the situation existing at that time. Furthermore, the 1944 amendment was an exception to the general statute vesting in this Court jurisdiction over appeals in antitrust equity cases, a provision which wisely acknowledged the importance of this class of cases and the desirability of having them reviewed uniformly and expeditiously in this Court without the necessity of an intermediate appeal. The court below, therefore, properly recognized that the purpose of the statute was not to limit the jurisdiction of this Court over such appeals to any greater extent than was required by the inability of this Court to act because of the absence of a quorum.

We do not think it necessarily follows, however, that because jurisdiction of the Circuit Court of Appeals was narrowly limited to the appeal before it, it lost the power to enforce its mandate. This question has two facets: (1) The intention of Congress in 1944 when it gave the Circuit Court of Appeals jurisdiction over "the appeal," and (2) whether a court's jurisdiction to enforce its mandate is dependent upon its possible jurisdiction over a future appeal in the cause.

1. Nothing in the statute or its history sheds specific light on the question whether the authority granted to the Circuit Court of Appeals included authority to enforce the mandate. The intention of Congress, as we have seen, was to allow only a narrow exception to the general scheme for direct appeal to the Supreme Court.

The precise issue, as we see it, is whether Congress would have regarded a proceeding to enforce the judgment entered by the Circuit Court of Appeals as an integral part of the original appeal transferred to that court, or as a new ap-

peal. The Government brought its petition for mandamus to the Circuit Court of Appeals because it thought enforcement of the mandate a part of the original appellate proceeding. The statute provides for transfer of the appeal to "the circuit court of appeals." We think this indicates that Congress meant the court to which the appeal was certified to function with the usual powers of a circuit court of appeals. This includes the power to see that its mandate is enforced, by mandamus if necessary. *Delaware, Lackawanna & Western R. Co.* v. *Rellstab,* 276 U. S. 1; *Morris* v. *Securities and Exchange Commission,* 116 F. 2d 896 (C. C. A. 2); *S. S. Kresge Co.* v. *Winget Kickernick Co.,* 102 F. 2d 740 (C. C. A. 8). Indeed, the power to enter a final judgment would be ineffective if power to see that the lower court complied with the judgment were not so conferred. An appellate jurisdiction, once invoked and exercised, is not exhausted until the mandate is transformed from a thing of words into an instrumentality effecting the purposes of the appellate court.

We think it unlikely that the Congress which enacted the 1944 amendment would have intended the Circuit Court of Appeals to have less authority than federal appellate courts generally to enforce their judgments—even though it would not have jurisdiction over a subsequent appeal in the case unless this Court again lacked a quorum.

2. We think the court below erred in suggesting that power to enforce a judgment rests solely on a court's future appellate jurisdiction. Although the authority to issue such extraordinary writs as "may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law" (Judicial Code, Section 262, 28 U. S. C. 377) often may depend upon the existence of a future appellate jurisdiction, that is

not necessarily the case. When a proceeding has not yet reached an appellate stage, the appellate court's authority to issue a writ normally will rest upon its ultimate power to control the final disposition of the case on a future appeal, or on the need for protecting this final authority. See *Ex parte United States*, 287 U. S. 241, and cases cited. But that is not the basis for an appellate court's authority to enforce a judgment already rendered. In such cases an appellate court must have jurisdiction to require the lower court to obey its mandate if the ultimate authority of the appellate tribunal is to prevail, irrespective of whether there can be a subsequent appeal.

Thus *In re Washington & Georgetown Railroad Co.*, 140 U. S. 91, where the lower court allowed interest on a judgment in violation of the mandate of this Court, and the amount of the interest was too small to be the subject of a new writ of error from this Court, mandamus was granted. The propriety of mandamus under such circumstances was again recognized in *City Bank of Fort Worth* v. *Hunter*, 152 U. S. 512. We take these decisions to mean that in the exercise of a court's appellate authority mandamus will issue although there can be no future appellate review, and therefore that it issues to support the past exercise of jurisdiction by the court. That a circuit court of appeals may grant mandamus in aid of a past exercise of jurisdiction is indicated in *Delaware, Lackawanna and Western Railroad Company* v. *Rellstab*, 276 U. S. 1. Additional support is to be found in: *Sibbald* v. *United States*, 12 Pet. 488; *Heine* v. *Levee Commissioners*, 19 Wall. 655, 660; *Virginia* v. *Rives*, 100 U. S. 313, 316, 323, 327, 329; *Labette County Commissioners* v. *Moulton*, 112 U. S. 217; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255; *United States* v. *Terminal R. R. Ass'n*, 236 U. S. 194,

199; *Baltimore & Ohio Railroad Co.* v. *United States*, 279 U. S. 781; *Ex Parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533; *Ex Parte Texas*, 315 U. S. 8.

We have found no decision of a federal court denying mandamus to compel compliance with an appellate mandate upon the ground that the court had no future appellate jurisdiction. While there are expressions in cases not involving appellate mandates that mandamus "can only be granted in aid of an existing jurisdiction" (*Chickaming* v. *Carpenter*, 106 U. S. 663, 665); that "if there is no appeal pending here and be no appeal, we are wholly without authority to issue a writ of mandamus" (*Mutual Life Insurance Co.* v. *Holly*, 135 F. (2d) 675, 676 (C. C. A. 7)); and that the true test of appellate jurisdiction to grant mandamus is the existence of a right to review "and not the prior exercise of that right by appeal or by writ of error" (*Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. 945, 955 (C. C. A. 8)), these were general observations in the course of decisions not concerned with the enforcement of a prior appellate mandate.

For the above reasons we submit that the jurisdiction vested in the Circuit Court of Appeals by the 1933 amendment includes the power to enforce its mandate irrespective of its lack of future appellate jurisdiction over the case.

The last paragraph of the opinion below suggests that the court below did not regard as an absolute bar to mandamus the principles which the earlier portions of the opinion seem to approve. The paragraph indicates that the importance of the issue raised by the Government's petition for mandamus in relation to the problem of subsequent dissolution served to tie the proceeding more closely to the issue of dissolution which would eventually come before this Court on appeal than to the original

judgment, which left undetermined the issue of dissolution. The Government's petition, however, was intended to prevent the District Court from passing on the question of monopoly, which the Circuit Court of Appeals had adjudicated, not dissolution—although the Government's motive was, of course, to prevent a determination which would impair the ultimate decision on the question of dissolution left open by the judgment.

Furthermore, although the original judgment of the Circuit Court of Appeals did not determine the issue of dissolution, it did require the District Court to "wait" (R. 11) the action of the Government's surplus property disposal agency in disposing of its aluminum properties.

We have some difficulty in seeing why the court below has less authority to enforce compliance with its mandate on these questions than on any others. The court's reluctance to decide a matter which was important largely because of its effect upon a future dissolution proceeding seems to be in large part a manifestation of the court's interpretation of the 1944 statute as creating as narrow an exception as possible to this Court's normal appellate jurisdiction over the case. This is a very uncertain criterion for determining what aspects of its judgment the court below has authority to enforce. It is important that the parties to this case not be left in continued doubt as to

the appellate court in which future proceedings for the enforcement of the judgment herein should be taken.[1]

Respectfully submitted.

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MARCH, 1948.

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[1] Although Judge Caffey resigned on October 31, 1947 (after the Circuit Court of Appeals denied the application for mandamus), Judge Caffey's orders are the law of the District Court and must be followed by any judge designated to succeed Judge Caffey in the case, according to the rule and practice prevailing in the Second Circuit. *Commercial Union of America, Inc.* v. *Anglo-South American Bank, Ltd.*, 10 F. 2d 937 (C. C. A. 2); *In re Hines*, 88 F. 2d 423 (C. C. A. 2); *United States* v. *Steinberg*, 100 F. 2d 124 (C. C. A. 2); *Farmers' Loan and Trust Co.* v. *Miller*, 298 Fed. 758 (S. D. N. Y.); *Aachen & Munich Fire Insurance Co.* v. *Guaranty Trust Co.*, 24 F. 2d 465 (S. D. N. Y.).

Out of an abundance of caution the Government applied to the Senior Judge of the District Court for assignment of the case to another judge for the expressed purpose of enabling the Government, before applying for relief in this Court, to seek from the succeeding judge determination of whether Judge Caffey's orders would be reconsidered or, on the other hand, confirmed. The Senior Judge, declining so to assign the case, confirmed the practice of the court to be as stated. The transcript of the proceeding before the Senior Judge is printed at pp. 58-64 of the Government's petition for mandamus in No. 303, Misc., this Term. That the writ of mandamus ultimately sought may be addressed to the inferior court as such is stated in *Virginia* v. *Rives*, 100 U. S. 313, 328.

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